

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1291 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?

No

STATE OF GUJARAT

Versus

RAMANBHAI DURLABHBHAI PATEL & ANR.

Appearance:

Shri S.T. Mehta, Additional Public Prosecutor,
for the Appellant

Shri Adil Mehta, Advocate, for Respondent No. 1

Respondent No.2 served

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 25/09/96

ORAL JUDGEMENT

How the lack of a little extra carefulness on the part of certain official of the Court of the Judicial Magistrate (First Class) at Vyara has proved a costly lapse for and a fatal blow to the prosecution is amply

and eloquently demonstrated in this case.

2. The judgment and order of acquittal passed by the learned Additional Sessions Judge of Surat on 11th July 1984 in Criminal Appeal No. 76 of 1982 is under challenge in this appeal by leave of this Court under sec. 378 of the Code of Criminal Procedure, 1973 (the Code for brief). Thereby the learned Additional Sessions Judge accepted the appeal of respondent No. 1 herein against his conviction by the learned Judicial Magistrate (First Class) at Vyara of the offence punishable under sec. 16(1)(i) read with sec. 7(i) of the Prevention of Adulteration Act, 1954 (the Act for brief) by his judgment and order passed on 16th June 1982 in Criminal Case No. 1236 of 1981. Thereby respondent No. 1 herein was sentenced to simple imprisonment for one month and fine of Rs. 500 in default simple imprisonment for 15 days more for the offence proved against him.

3. It is not necessary to set out in detail the facts giving rise to this appeal. It appears that the Sanitary Inspector in the Ukai Project area took sample of buffalo milk On 2nd May 1981 from respondent No. 1 herein and it was found to be adulterated by the Public Analyst. He thereupon lodged his complaint with respect to the offence stated to have been committed by respondent No. 1 under sec. 16(1)(i) read with sec. 7(i) of the Act. It came to be registered as Criminal Case No. 1236 of 1981. It ended in conviction of respondent No. 1 of the aforesaid offence and sentence of simple imprisonment for one month and fine of Rs. 500 in default simple imprisonment for 15 days more. That aggrieved respondent No. 1 herein. He therefore carried the matter in appeal before the Sessions Court at Surat. It came to be registered as Criminal Case No. 76 of 1982. It was assigned to the learned Additional Sessions Judge at Surat for hearing and disposal. It appears that in the court of appeal on behalf of the prosecution an application for additional evidence was made for bringing on record certain additional materials. It came to be taken on record as Ex. 15 in the appellate proceeding. By his order passed therebelow on 8th December 1983, the learned Additional Sessions Judge accepted the application for additional evidence and remitted the matter to the trial court for recording the additional evidence only on that point. Pursuant thereto, the matter went to the trial court and additional evidence was recorded. Thereafter, by his judgment and order passed on 11th July 1987 in Appeal No. 76 of 1982, the learned Additional Sessions Judge accepted the appeal and acquitted respondent No. 1 herein of the offence of which

he was convicted by the learned trial Magistrate. The aggrieved State Government has thereupon approached this Court by leave of this Court and has invoked its appellate jurisdiction of this Court under sec. 378 of the Code for questioning the correctness of the aforesaid appellate judgment and order of acquittal.

4. Learned Advocate Shri Adil Mehta for respondent No.1 has raised a preliminary objection against maintainability of this appeal by submitting that the appeal would lie only at the instance of the complainant, namely, the concerned Sanitary Inspector, and not at the instance of the State Government in view of sec. 378(4) of the Code. In support of his submission, he has relied on the ruling of the Kerala High Court in the case of State of Kerala v. V.S. Raj and another reported in 1985(1) F.A.C. at page 281. As against this, learned Additional Public Prosecutor Shri S.T. Mehta for the appellant-State has submitted that, in view of the scheme of sec. 378 of the Code, the present appeal at the instance of the State Government is maintainable.

5. In order to appreciate rival submissions urged before me, it would be quite proper to look at sec. 378 of the Code in its entirety. It reads:

S. 378 (1) Save as other provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an

application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

A bare perusal of sec. 378 of the Code makes it clear that it provides for an appeal against the judgment and order of acquittal whether passed in the original proceeding or in the appellate proceeding. Sub-section (1) thereof inter alia empowers the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court. It is subject to sub-sections (3) and (5). It is not necessary to dilate upon sub-section (2) thereof as it is not material for the present purpose. Sub-section (3) thereof puts an embargo on the right of appeal and it has inter alia been provided therein that an appeal under sub-section (1) thereof would lie by leave of the High Court. Sub-section (4) enables the original complainant to prefer an appeal against the order of acquittal after obtaining special leave from the High Court. Sub-section (5) provides limitation of 6 months for making an application for special leave to appeal if the complainant is a public servant and the limitation of 60 days in every other case computed from the date of the order of acquittal sought to be appealed against. Sub-section (6) bars an appeal under sub-section (1) thereof if an application for special leave to appeal under sub-section (4) is rejected by the High Court. On the aforesaid analysis of sec. 378 of the Code, it becomes clear that the original complainant is empowered to apply for a special leave to appeal against the order of acquittal. The time-limit for applying for leave to appeal is 6 months if the complainant is a public servant and 60 days in every other case to be computed from the date of the order of acquittal sought to be appealed against. It thus becomes clear that, if the State Government has to prefer an appeal under sub-section (1)

thereof, it has to prefer it within 60 days from the date of the order of acquittal sought to be appealed against. In view of sub-section (3) thereof, the State Government has also to obtain leave from the High Court for entertainment of its appeal against the order of acquittal. It may happen that the State Government may not be in a position to move for leave to appeal against the concerned order of acquittal. It is possible that the original complainant might have been aggrieved by the order of acquittal passed in a criminal case. The Legislature in its wisdom appears to have thought it fit not to allow the original complainant in such a case to be without any remedy. With that end in view sub-section (4) thereof appears to have been brought on the statute book. Over and above enabling the State Government to prefer an appeal against the order of acquittal inter alia under sub-section (1) thereof, the original complainant is also enabled to move the High Court under sub-section (4) thereof for special leave to appeal against the order of acquittal. It may be mentioned that the private complainant has to apply for special leave to appeal against the order of acquittal within 60 days from the date of the order of acquittal sought to be appealed against. In the case of a public servant, the time-limit is of 6 months under sub-section (6) thereof as aforesaid. So far as the private complainant is concerned, it is possible that he might have been aggrieved by the order of acquittal. He might apprehend that the State Government may not be in a position to move for leave to appeal against the order of acquittal within the stipulated time-limit. In that case he might apply for special leave to appeal against the order of acquittal within the stipulated time-limit of 60 days. A public servant is usually a government servant or his service would be in the nature of government service. If he has to set in motion the machinery of criminal law by lodging a complaint and if it has ended in acquittal, he might wait for the State Government to move the High Court for leave to appeal within the prescribed time-limit of 60 days. If he finds that the State Government does not move for diverse reasons in that regard, he is also empowered to apply for special leave to appeal against the order of acquittal within the stipulated time-limit of 6 months. It thus becomes clear that the right of applying for special leave to appeal against the order of acquittal given to the original complainant is supplemental to the right of appeal conferred on the State Government to challenge the order of acquittal by leave of the High Court. Such right of appeal given to the State Government and that given to the private complainant are not mutually exclusive. It

is not the scheme of sec. 378 of the Code that the right of appeal against the order of acquittal in the case instituted by the private complainant inheres only in the private complainant under sub-section (4) thereof and not in the State Government under sub-section (1) thereof. Not subjecting sub-section (1) thereof to sub-section (4) thereof is a clear pointer in that regard.

6. My aforesaid view is in consonance with the relevant provisions contained in sub-section (6) thereof. It has been made clear therein that no appeal from the order of acquittal shall inter alia lie under sub-section (1) thereof if the application under sub-section (4) thereof for the grant of special leave to appeal from an order of acquittal is refused. It thus becomes clear that, if a criminal case has arisen on the basis of a private complaint and if that private complainant is aggrieved by the order of acquittal, he can also apply for special leave to appeal against that order of acquittal under sub-section (4) thereof. That right of obtaining special leave to appeal against the order of acquittal conferred on the private complainant cannot and need not preclude the State Government from questioning the correctness of the order of acquittal by leave of the High Court. In view of this scheme of sec. 378 of the Code, I am unable to accept the submission urged before me by learned Advocate Shri Adil Mehta for respondent No. 1 that the present appeal at the instance of the State Government is not maintainable.

7. The question may be examined from a different angle and the same result would ensue. If the order of acquittal passed in a criminal case arising from the private complaint is allowed to be challenged only by the private complainant in view of sec. 378(4) of the Code, an undesirable result would follow. It is possible that, even if the order of acquittal is unsustainable in law, the private complainant may not challenge it in appeal if he is won over by the acquitted accused on some consideration, material or otherwise; or he is unable to prefer his appeal for diverse reasons. If the scheme of sec. 378 of the Code has to be interpreted as to confer the right of appeal against the order of acquittal in a criminal case arising from a private complaint on the private complainant alone, the State Government will be a helpless onlooker or spectator if the private complainant does not choose to challenge or cannot challenge such order of acquittal. The Legislature could not have visualised helplessness on the part of the State Government to challenge the order of acquittal by the leave of this Court. The only embargo on the right of

the State Government to challenge an order of acquittal is found in sec. 378(6) of the Code. If an application for special leave to appeal against the order of acquittal made by the private complainant is rejected, the State Government is precluded thereby from filing any appeal *inter alia* under sub-section (1) thereof. Subject to this rider, the State Government is free to challenge the order of acquittal under sec. 378(1) of the Code after obtaining leave of the High Court whether or not the concerned criminal case resulting in the order of acquittal has arisen from any private complainant. Even if the private complainant obtains special leave to appeal under sub-section (4) thereof, in my humble opinion the right of the State Government to appeal against the order of acquittal under sub-section (1) thereof is not lost.

8. In the present case, the public servant holding the post of the Sanitary Inspector of the Ukai Project area instituted the complaint charging respondent No.1 herein for the offence punishable under the relevant provisions contained in the Act. The criminal case arising therefrom has ended in acquittal in the appellate proceeding. Even if the public servant filing the complaint has not chosen to apply for special leave to appeal against that order, the State Government has rightly, by leave of this Court, chosen to invoke the appellate jurisdiction of this Court under sec. 378(1) of the Code. The appeal at its instance is certainly maintainable.

9. With respect, the learned single Judge of the Kerala High Court in its aforesaid ruling has not properly considered the scheme of sec. 378 of the Code. With respect, the conclusion that the appeal against the order of acquittal in a criminal case arising from a private complaint can be instituted only by the complainant appears to be *ipse dixit*. In view of my analysis of the scheme of sec. 378 of the Code, I am unable to persuade myself to agree with the aforesaid conclusion reached by the learned single Judge of the Kerala High Court. It cannot be gainsaid that the aforesaid ruling of the Kerala High Court is not binding to this Court. It has merely a persuasive value. As pointed out hereinabove, I am unable to persuade myself to agree with the view taken in the aforesaid ruling of the Kerala High Court. I respectfully disagree with it.

10. That brings me to the merits of the case. It must be said in fairness to the prosecution that it could bring the guilt home to the accused beyond reasonable

doubt except for one technical flaw. It appears that respondent No.1 herein requested the court to send the sample of milk to the Central Food Laboratory at Pune. It was so sent. It appears that at that stage the relevant provisions contained in rule 4(3) of the Prevention of Food Adulteration Rules, 1955 (the Rules for convenience) were not proved to be complied with. It is a settled principle of law that the provisions of rule 4(3) of the Rules are mandatory. A strict compliance thereof would be necessary. The prosecution could not prove that a copy of the memorandum and a specimen impression of the seal used to seal the container and the cover were sent separately by registered post to the Director of the Central Food Laboratory at Pune. It appears that in the office copy of the memorandum in the file of the trial court it was mentioned that the memorandum together with the specimen impression of the seal in question and the cover was sent separately by registered post to the Director of the Central Food Laboratory at Pune. No receipt of registration or any acknowledgment slip duly signed by the addressee received back to the sender was brought on record to show compliance with the mandatory provisions contained in rule 4(3) of the Rules.

11. It is difficult to agree with learned Additional Public Prosecutor Shri S.T. Mehta for the appellant that the noting made in the office copy of the memorandum regarding separate despatch by registered post of the memorandum and the specimen impression of the seal in question and the cover should enable the court to raise presumption as to official acts in view of sec. 114 of the Indian Evidence Act, 1872. The reason therefor is quite simple. In the first place, as rightly held by the learned trial Judge, compliance of rule 4(3) of the Rules would be a question of fact. It has to be proved by leading cogent and convincing evidence in that regard. Resort to sec. 114 of the Indian Evidence Act, 1872 can be had only under special circumstances like destruction of the record in that regard after certain specified period or misplacement of the record of the case which could not be traced even after due diligence on the part of the prosecution agency or the like grounds. Resort to the aforesaid statutory provision in the law of evidence cannot be resorted to as a substitute of the proof of a fact the burden of which lies on the prosecution.

12. Even otherwise, the prosecution applied for proving that fact by means of its application for additional evidence at Ex. 15 on the record of the appellate proceeding. It transpires from the order

passed therebelow on 8th December 1983 that the prosecution wanted inter alia to prove the fact of compliance with rule 4(3) of the Rules. It appears that, pursuant to the order passed by the learned Additional Sessions Judge below the application at Ex. 15 on the record of the appellate proceeding allowing production of additional evidence, the matter went to the trial court and additional evidence was recorded. Even at that stage no attempt was made to bring on record the material to show compliance with rule 4(3) of the Rules. After seeking an opportunity to lead evidence in that regard and after failing to do so, it would not be open to the prosecution agency to request the court to resort to sec. 114 of the Indian Evidence Act, 1872 for drawal of presumption regarding compliance with rule 4(3) of the Rules.

13. The learned appellate Judge has found that rule 4(3) of the Rules has not been complied with. It is certainly a mistake on the part of the court. A little more carefulness on the part of the concerned official of the trial court could have resulted in meticulous compliance with rule 4(3) of the Rules. The lack of a little extra carefulness on the part of such official of the trial court has proved a costly lapse for the prosecution. I do not find fault with the learned trial Magistrate for such a costly lapse. Sending of the sample to the Director of the Central Food Laboratory at Pune in accordance with the relevant provisions contained in rule 4(iii) of the Rules was simply a ministerial work to be performed by his staff. It would have been better and more desirable if he had tried personally to supervise such despatch. In any case, it appears that Dame Fortune was smiling favourably on respondent No. 1 at the relevant time.

14. In view of my aforesaid discussion, I am of the opinion that the impugned judgment and order of acquittal passed by the learned Additional Sessions Judge in appeal calls for no interference by this Court in this appeal. The acquittal of respondent No.1 of the offence with which he was charged deserves to be affirmed.

15. In the result, this appeal fails. It is hereby dismissed.
